80-1558

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LE BEOUF BROTHERS TOWING COMPANY, *in personam*, and BARGE T/B LBT4, her engines, tackle, appurtenances, etc., *in rem*,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the decision by the Fifth Circuit Court of Appeals that a towboat is not a "third party" vis-a-vis a dumb, unmanned barge in its tow, conflicts with the Second Circuit's holding in *Tug Ocean Prince v. United States*, 584 F.2d 1151 (2nd Cir. 1978) which reached a contrary result?

B. Whether the refusal by the Fifth Circuit Court of Appeals to apply maritime principles to resolve ambiguities concerning the meaning and identity of "third party" as used in 33 U.S.C. 1321(f) and (g) represents precedent-setting error?

C. Whether the decision of the Fifth Circuit Court of Appeals, in particular, its refusal to apply maritime law, conflicts with the approach and rationale of the First, Second and Fourth Circuits in resolving ambiguities in 33 USC §1321?

LIST OF ALL PARTIES

Pursuant to Rule 28.1, all parties to this proceeding, including parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation are: LeBeouf Brothers Towing Co., Defendant/Appellee/Petitioner, and Gonsoulin Industries, Inc. and the United States of America, Plaintiff/Appellant/Respondent.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

LE BEOUF BROS. TOWING CO., ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 621 F.2d 789 and it appears herein at Appendix A, p. A-1; the order of the Fifth Circuit denying the application for rehearing was entered on October 10, 1980, reported at 629 F.2d 1350, and appears herein at Appendix B, p. B-1. The decision of the United States District

Court for the Eastern District of Louisiana, rendered on August 16, 1978, is reported at 1978 AMC 2195 and appears at Appendix C, p. C-1.

JURISDICTION

The opinion and judgments of the United States Court of Appeals for the Fifth Circuit were entered on July 18, 1980 and the order denying the request for rehearing was entered on October 10, 1980. On December 18, 1980, an order (A-531), signed by Justice Lewis Powell, was entered, extending the time for filing a petition for writ of certiorari to and including March 9, 1981.

The jurisdiction of this Honorable Court is invoked pursuant to 28 USC §1254(1).

STATUTORY PROVISIONS

The statutory act around which the instant case revolves is the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, as amended, 33 U.S.C. §§1251-1376. The relevant provisions of this Act, §1321(f)(1) and §1321(g) are set forth below:

§1321(f)(1)—Liability for actual costs of removal.

> "(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war,

(C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, . . ."

§1321(g)—Third party liability.

"(g) Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (C) of this section for removal of such oil or substance and shall be

entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act of omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsec-

tion shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. . . ."

STATEMENT OF THE CASE

This case involves an action brought by the government pursuant to 33 USC §§1321(f) and (c)(1) to recover the expenditure of $38,689 for cleanup costs incurred as the result of a discharge of oil on March 20, 1974 from a dumb, non-self-propelled barge, the LBT No. 4, owned by LeBeouf Bros. Towing Co. (hereinafter LeBeouf). Prior to March 20, 1974, LeBeouf entered into an oral contract with Bayou Marine Corp. (hereinafter Bayou), a marine broker in the business of securing towage contracts for its clients. Bayou agreed to procure the services of a tug and competent crew, including a licensed tankerman to tow the LBT No. 4 from place to place. Bayou hired the Tug Harding R, owned and operated by Barracuda Marine, to perform this contract. The navigation of the vessels and the un-

loading and loading of cargoes from the LBT No. 4 were performed by the crew of the tug. LeBeouf maintained no control whatsoever over the navigation of the tug and barge, other than to identify locations where cargo was to be loaded and discharged, nor over the tug's crew.

On March 20, 1974, operating pursuant to the towage contract, the Tug Harding R and the LBT No. 4 moored at the Permian Oil Facility in Westwego, Louisiana for the purpose of discharging cargo. While at the facility, an employee of Barracuda, who was a crewmember of the tug, opened the wrong valve and thereby discharged 60 barrels of crude oil into the Mississippi River. Shortly thereafter, the Coast Guard employed a commercial contractor to clean up the oil. The cost of cleanup was $38,689.

In the proceeding in the Federal District Court, Eastern District of Louisiana, brought by the government pursuant to 33 USC §§1321(c)(1) and (f) to recover the cleanup costs, LeBeouf asserted the statutory defense that the discharge was caused solely by the actions of a third party, the unlicensed crewmember of the tug.

On August 16, 1978, the Honorable Edward J. Boyle, Sr. confirmed the applicability of the third party defense in ruling that the negligent acts of a crewmember aboard the tug, in whose care, custody and control the barge had been placed, could not be ascribed to LeBeouf merely because it owned the barge. The

Court held that the purpose of the third party defense was to relieve the owner of the vessel of liability for acts by parties not controlled by the offending vessel. In reaching this decision, Judge Boyle acknowledged both the similarity of the instant case with the *Tug Ocean Prince v. United States*, 436 F.Supp. 907 (S.D.N.Y. 1977), *aff'd in part, rev'd in part on other grounds*, 584 F.2d 1151 (2nd Cir. 1978), *cert. den.*, 440 U.S. 959 (1979), and the necessity of applying maritime principles to resolve the ambiguities surrounding the statutory meaning and intent of the term "third party."

On July 18, 1980, the Fifth Circuit, without even attempting to distinguish the instant case from *Ocean Prince*, ignored the conclusions of the Second Circuit and reversed the holding of federal district court. The Fifth Circuit, while finding that the term "third party" must be narrowly interpreted, failed to offer any insight as to why even a narrow reading of "third party" necesarily precludes the correctness of the application of that defense to the instant case. The Court adopted the rationale of the First Circuit in *Burgess v. Tamano*, 564 F.2d 964 (1st Cir. 1977), *cert. den.* 435 U.S. 941 (1978) that the term "third party" must be narrowly construed, yet rejected the application of maritime jurisprudence utilized by the First Circuit as well as the Second and Fourth Circuits and the lower court in this matter, all of which have applied admiralty principles to resolve ambiguities in the statute.

REASONS FOR GRANTING THE WRIT

I.

The holding of the Fifth Circuit rejects the concept that a tug in a towage situation is the "dominant mind" and that its acts cannot be attributed to a dumb barge in tow. Such a holding is a precedent-setting error as it directly conflicts with established maritime principles articulated by this Honorable Court which have consistently recognized the separate identities of the tug and barge. The jurisprudence is legion with cases that support the doctrine pronounced in 1860 in *Sturgis v. Boyer*, 65 U.S. (24 How.) 110 (1860) that the tug has a distinct identity from the vessels in its tow. In *Sturgis*, the owners of a lighter which collided with a manned, non-self-propelled vessel, the Wisconsin, in the tow of the Tug Hector, sought to recover from the Wisconsin for damages resulting from the collision. Recovery against the Wisconsin was denied by the Court on the grounds that the vessel was exclusively under the command and direction of the master of the Tug Hector. Forty-nine years later, this principle was reiterated in the *Eugene F. Moran v. New York C. & H. R.R. Co.*, 212 U.S. 466 (1909). In *Moran*, the Supreme Court reaffirmed its earlier holding that a tug having control over a vessel in its tow was solely responsible to parties for damages occasioned by the tug. Accord, *Liverpool B & R.P. Steam Navigation v. Brooklyn Terminal*, 251 U.S. 48 (1919). Thus, it is a matter of settled law that the tug and barge are not construed as having one interest for the purpose of

imposing liability attributable to the tug onto the tow. *See* G. Gilmore & C. Black, *The Law Of Admiralty* 515 (2d ed. 1975). The tug has the dominant mind and as such is liable for damages unless there is a breach of duty on the part of the barge, such as improper lighting or unseaworthiness. *Old Time Molasses Company v. United States*, 31 F.2d 963 (5th Cir. 1929). *Stall and McDermott v. The Southern Cross*, 196 F.2d 309 (5th Cir. 1952). *The Rebecca*, 152 F.2d 607 (4th Cir. 1945) and *Hart v. Blakemore*, 410 F.2d 218 (5th Cir. 1969).

Section 1321(f), which provides the government recovery for cleanup costs incurred in removing discharged oil, allows four defenses to dischargers. These defenses include a "third party" defense, *i.e.*, the discharger is absolved of liability where he proves the discharge was caused solely by acts of a third party. The statute is silent, however, as to the meaning of "third party." Similarly, the legislative history of Section 1321 offers little insight aside from a single statement in the Report of the Committee on Public Works regarding S. 7, the forerunner of Section 1321 and the source of the third party defense. The statement expressly indicates that the tug and tow are separate vessels for purposes of liability. Liability is imposed

> [F]or the costs of removal on owners or operators of the vessels which discharge oil into the navigable waters of the United States or adjoining shorelines or into the contiguous zone. The liability is measured per vessel, per

> owner, per discharge. In the case of a barge and tow, each barge in the tow *and* the powered vessel or vessels are considered to be *separate vessels.* (emphasis added)

Report of Senate Committee on Public Works No. 91-351, p. 17 (1969).

This is fully in accord with settled principles, *supra,* that the tug as the dominant mind in sole control over the tow, is exclusively responsible for damages to the government or any other party. This declaration of intent also explains Section 1321(g) which affords the government a mechanism for recovery against non-discharging vessels causing the spill. This section, unlike §1321(f) speaks in terms of causation and measures recovery on the basis of the tonnage of the third party vessel, not the discharging vessel. The court in *Tug Ocean Prince v. United States,* 436 F.Supp. 907 (S.D.N.Y. 1977), *aff'd in part, rev'd in part on other grounds,* 584 F.2d 1151 (2nd Cir. 1978), *cert. den.,* 440 U.S. 959 (1979), recognized that the inclusion of both §1321(f) and 1321(g) in the legislative scheme clearly represented:

> "[A] conscious legislative choice to inject traditional admiralty concepts into the limitation calculation by limiting a third party vessel owner's liability with reference to his vessel rather than the vessel which actually spilled the oil.

> . . . It is inconceivable that Congress was unaware that much of the oil moving on inland waterways is carried by barges and that the tugs pushing them are often owned by *third parties.*" 436 F.Supp. at 923 (emphasis added).

The Court went on to impose liability on the tug for a discharge from a barge in its tow.

II.

Under traditional admiralty concepts, the tug was liable, not the barge, for negligent towage. And, it was this principle that prevailed in the *Tug Ocean Prince* wherein liability was imposed not on the barge from which an oil spill emanated but on the Tug Ocean Prince, in whose care, custody and control the barge had been placed. The statute provides that absent, willful negligence or willful misconduct, liability is imposed in the amount of $100 per gross ton of the discharging vessel or, where a third party vessel is solely responsible, $100 per gross ton of that vessel. 33 USC 1321(f) and (g).[1] The government had sought to recover cleanup costs based on a combined tonnage of the tug and barge. The court, however, only imposed liability on the tug as the third party even though that recovery was necessarily less than if the tonnage of the barge had also been included.

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1 The limits have been increased.

While recognizing that

> "Obviously, once the limitation is calculated with reference to a vessel other than that which spilled the oil, . . . the correlation between vessel gross tonnage and actual clean-up costs is destroyed . . ."

the court concluded that to aggregate the tonnage even in the situation "as presented here" where the smaller tug causes a spill from a barge in its tow, would be contrary to the statutory language and the conscious legislative adoption of traditional admiralty concepts. 436 F.Supp. at 923.

On appeal before the Second Circuit, the district court's holding that errors in navigation and mismanagement of the tug and its tow were not within the tug owner's privity and knowledge was reversed. The Second Circuit held that the actions of the tug's owner and crew constituted willful misconduct, which, under the terms of the statute, justifies lifting the per tonnage limitation. The salient aspect of the decision, however, is that the underlying rationale, wherein liability was imposed on the tug as the third party pursuant to §1321(g), was not disturbed. *See* 584 F.2d at 1155 and 1162.

III.

As discussed above, in *Tug Ocean Prince* the Second Circuit lifted the statutory limits of third party lia-

bility imposed pursuant to Section 1321(g) on the tug for a discharge from a barge in its tow upon finding willful misconduct within the privity and knowledge of the tug's owner. In reaching this result, however, the Second Circuit encountered a problem similar to the one in the instant case in that the terms "willful negligence" and "misconduct" were not defined in the statute. Unlike the Fifth Circuit's resolution of the dilemma, however, the Second Circuit followed established maritime standards of conduct involving towage, unseaworthiness, navigation, proper manning and other admiralty principles to conclude that willful misconduct was present. Similarly, in *Steuart Transportation Company v. Allied Towing Corp.*, 435 F.Supp. 798 (E.D. Va. 1977), 596 F.2d 609 (4th Cir. 1979), which involved a discharge from a barge, both the lower court and the Fourth Circuit adopted admiralty principles to resolve whether the owner of the tug could be held liable for a discharge from an unseaworthy barge in its tow. After applying admiralty principles to the facts in that case, the tug owner was exonerated. In *Steuart*, as in the instant case, a tankerman's negligent acts were responsible for the unseaworthiness of the barge in the ensuing discharge. However, in *Steuart*, the tankerman was an employee of the barge.

The Second and Fourth Circuits are not alone in resorting to maritime law to fill the interstitial nature of §1321. The lack of clarity in §1321(f) and (g) concerning the identity of "third parties" was resolved in the First Circuit in *Burgess v. Tamano*, 564 F.2d 964 (1st Cir.

1977), by resort to existing maritime jurisprudence. In *Tamano*, the First Circuit relied on over a hundred years of jurisprudence to conclude that acts of a pilot are attributed to the vessel. *China*, 7 Wall (74 U.S.) 53, 19 L.Ed. 67 (1869). Accordingly, the third party defense was disallowed. The First Circuit extensively discussed prevailing admiralty law in order to harmonize these principles with Section 1321. The pilot was deemed not a "third party" only after the Court superimposed on Section 1321, maritime jurisprudence which clearly dictated such a result. As was vigorously argued before the Fifth Circuit in the instant case, the *Tamano* decision fully supports the holding by lower court that under maritime law, the Tug, HARDING R, is a third party vis-a-vis LeBeouf and the LBT No. 4. *See also United States v. Hollywood Marine, Inc.*, 625 F.2d 524 (5th Cir. 1980).

Unlike the Courts in *Tamano*, *Steuart* and *Tug Ocean Prince*, the Fifth Circuit has failed to cite any principles of maritime law or any statutory language which would support the Court's holding that acts of the tug are now attributed to its tow so as to preclude a third party defense by the barge. The instant holding clearing constitutes precedent-setting error in that it purports to follow *Tamano*, while, in fact, it rejects the rationale applied in *Tamano* of incorporating maritime principles to rectify ambiguities in Section 1321.

The consequences of the misapplication of *Tamano* are exacerbated by the misplaced reasoning of the Fifth

Circuit that the comprehensive scheme of Section 1321 precludes barge owners from escaping liability by "merely hiring out their operations to tugs and independent contractors." 621 F.2d at 789. Such a declaration overlooks the practicalities of the situation, *i.e.*, that supplying motive power for any non-self-propelled vessel is a basic necessity; it has nothing to do with escaping liability. Obviously, where there is consanguinity of interests between the owner or operator of the barge and tug, as in *U.S. v. Ira S. Bushey & Sons*, 363 F.Supp. 110 (D.C. Vt. 1973), courts will go so far as to pierce corporate veils to prevent insulation from liability. *See also Valley Towing v. American Wheat*, No. 77-2990 (E.D. La., filed Nov. 13, 1979) *aff'd* 618 F.2d 341 (1980), where the discharging barge was owned by a wholly owned subsidiary of the tug. *LeBeouf*, however, like the situation in *Ocean Prince*, involved distinct, separate interests between tug and tow.

Rather than encourage "barge owners like LeBeouf to select tugs carefully," the Fifth Circuit holding will discourage careful towage, if not insulate towers, from their own negligence. Since the government, as a practical matter, will seek recovery from the vessel with the greatest tonnage and, concomitantly, exposure, i.e., the barge, the tug will rarely be sued as the operator of the discharging vessel since its limits of liability will be less than that of the barge. Unlike all other vessels, inland oil barges are expressly not subrogated to the rights of the government in recovering cleanup costs

from culpable third parties. This is because the inland oil barge does not have to clean up the spill in the first instance and can claim the third party defense which the draftsmen of the statute obviously thought would usually be available to the owners of the dumb barge. If the owner of the dumb barge is to be made liable and is to pursue its common law remedies against the tug, the tug will be able to limit its liability pursuant to the Limitation of Liability Act. 46 U.S.C. §§181-189, 9 Stat. 635 (1851). To the degree that the tug's exposure exceeds the value of the vessel, under the Act of 1851 the tug will be insulated from liability. Clearly, such a result is against public policy. *See Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122 (1955); and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963). The interpretation of the statute by the Fifth Circuit violates the liability scheme anticipated by Section 1321(g).

Finally, in grasping to find support for its artificial connexity between the tug and tow, the Fifth Circuit stated that a narrow interpretation of third party defense will promote the goals of the statute and of traditional tort policy because it will encourage prudent management by barge owners. Such a rationale overlooks or fails to perceive the nature of the act that caused the spill in this case to occur. This case did not involve mere negligence by a licensed tankerman. Rather, the discharge resulted from a tug crewman, who was not a certificated tankerman, undertaking to discharge the cargo. Such action constitutes a crimi-

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

LeBEOUF BROTHERS TOWING CO., etc.,
Defendant-Appellee.

No. 78-3261

UNITED STATES COURT OF APPEALS
Fifth Circuit

July 18, 1980.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., which entered judgment against the Government in its suit to recover cleanup costs for an oil spill from a tanker barge. The Court of Appeals, Thornberry, Circuit Judge, held that tugboat, over which owner-operator of tanker had no direct control or supervision, was not "third party" within meaning of section of Federal Water Pollution Control Act under which discharging vessel is not liable for costs of cleanup of oil spill caused by act or omission of third party.

Reversed and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

In this appeal from judgment against the Government in its suit to recover clean-up costs under 33 U.S.C. §1321 (1976) for an oil spill from appellee's tanker barge, we must interpret the clause in section 1321(f)(1) that establishes a third-party defense for the owners of the discharging vessel. Because we conclude that the tugboat hired by the appellees in this case does not constitute a "third party" under section 1321(f)(1), we reverse the judgment and remand the case to the court below.

I. Facts.

The parties stipulated the facts as follows. LeBeouf is in the business of transporting petroleum products in tanker barges. In 1974 LeBeouf contracted with Bayou Marine Corporation to obtain a tug and crew that would tow the non-selfpropelled tanker barge LBT #4 on an itinerary specified by LeBeouf. Bayou secured the M/V Harding R, a tug owned by Barracuda Marine Corporation. The tug crew loaded and unloaded LeBeouf's cargo at the places and times designated in LeBeouf's itinerary. LeBeouf engaged in no other super-

vision over the crew. In March 1974 the tug crew unloaded oil from the LBT #4 at Westwego, Louisiana. A tug crewman who was working as a tankerman without a license, in violation of 33 C.F.R. §155.710(a)(2) (1979), accidentally opened the wrong valve and discharged sixty barrels of crude oil onto the Mississippi River.

Neither LeBeouf, Bayou, nor Barracuda cleaned up the oil spill. Finally the Coast Guard contracted to clean up the spill at a total cost of $38,689. The Government sued to recover this clean-up cost under the Federal Water Pollution Control Act, 33 U.S.C. §1321, in March 1977. The district court dismissed the Government's suit against LeBeouf because it concluded that the oil spill was caused by a "third party" under section 1321(f)(1).

II. Third-Party Defense under Section 1321(f)(1).

Under section 1321(f)(1) the owner or operator of the discharging vessel is liable to the Government for the costs of cleaning up an oil spill

> [e]xcept where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any

> such act or omission was or was not negligent, or any combination of the foregoing clauses . . .

In cases involving inland oil spills, section 1321(g) requires the Government to sue the owner or operator of the discharging vessel for clean-up costs before it can sue a "third party" who may have caused the spill. The statute does not define what constitutes such a "third party."

LeBeouf contends that the term "third party" in section 1321(f)(1) should be interpreted broadly to include all parties — such as the tugboat in this case — over whom the owner-operator has no direct control or supervision. As authority for this interpretation, LeBeouf relies upon the district court opinion in *Tug Ocean Prince, Inc. v. United States*, 436 F.Supp. 907, 923-24 (S.D.N.Y. 1977), *aff'd in part and rev'd in part on other grounds*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959, 99 S.Ct. 1499 (1980). In *Tug Ocean Prince* a tug towed a tanker barge into submerged rocks, which caused the barge to spill oil onto the Hudson River. The tug owner sued to limit its liability as a "third party" under section 1321(g) so that damages would be calculated with reference to the weight of the tug alone, not with reference to the combined weight of the tug and barge together. The district court did not discuss section 1321(f)(1), but it treated the tug as a "third party" for purposes of section 1321(g), and construed that stat-

ute so that the tug's liability would be limited to damages calculated only with reference to the weight of the tug alone.

A broad interpretation of the term "third party" was rejected by the First Circuit in *Burgess v. M/V Tamano*, 564 F.2d 964, 981-82 (1st Cir. 1977), *cert. denied*, 435 U.S. 941, 98 S.Ct. 1520, 55 L.Ed.2d 537 (1978), in which the court expressly discussed what constitutes a "third party" under section 1321(f)(1). In *Burgess* the court held that a supertanker's temporary local pilot did not constitute a "third party" under section 1321(f)(1). As a result, the owners of the supertanker were held liable for an oil spill that occurred because the local pilot negligently ran the supertanker into a submerged ledge in a Maine harbor. The court concluded that the legislative purpose in drafting section 1321 as a strict liability statute would be undermined unless the third-party defense was narrowly interpreted. Even though the local pilot might be regarded as an independent contractor, he could not constitute a "third party" because the pilot acted for the ship and was subject to its ultimate control. In dicta the court reasoned that a shipyard that installed a defective valve would likewise not constitute a "third party" for the purpose of protecting the ship-owner from liability for an oil spill caused by the defect in the valve. If a vandal opened the valve and caused the spill, however, the court said that the third-party defense would apply.

Following the reasoning of the First Circuit in *Burgess*, we conclude that the third-party defense in section 1321(f)(1) must be narrowly interpreted. The statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners like LeBeouf could escape strict liability merely by hiring out their operations to tugs and independent contractors. A narrow interpretation of the third-party defense would make it consistent with the other section 1321(f)(1) defenses, which include only narrow exceptions such as acts of God, acts of war, and instances in which the Government's own negligence is the sole cause of the spill. The only significant legislative history relating to the third-party defense also suggests that a narrow interpretation is proper; a committee report indicates that the drafters' primary purpose for including the third-party defense was to cover situations in which a third-party ship collided with an unrelated, oil-carrying vessel and caused a spill. S. Rep. No. 91-351, 91st Cong., 1st Sess. 6 (1969).

Under the analysis used in *Burgess*, the tug in this case does not constitute a "third party" that would protect LeBeouf from liability for clean-up costs under section 1321. LeBeouf hired the tug to act in its place. Although the tug operated as an independent contractor, LeBeouf held ultimate control over it by hiring it in the first place, specifying its itinerary, and retaining it throughout the job. Our narrow interpretation of the third-party defense promotes the goals of the statute

and of traditional tort policy because it will encourage barge owners like LeBeouf to select tugs carefully and to insure against potential losses. LeBeouf can also require a tug to indemnify it for losses caused by the tug's conduct alone.

Because the tug does not constitute a "third party" for the purpose of protecting LeBeouf from liability under section 1321, we reverse the judgment and remand the case to the court below.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3261

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

LeBEOUF BROTHERS TOWING CO., etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, _____ F.2d _____).

(OCTOBER 10, 1980)

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON III
United States Circuit Judge

APPENDIX C

UNITED STATES OF AMERICA,
Plaintiff,

versus

LeBEOUF BROTHERS TOWING CO.,
IN PERSONAM, ET AL.,
Defendants.

United States District Court,
Eastern District of Louisiana,
August 11, 1978.

Civil No. 77-843.

Michael K. Bell, Admiralty & Shipping Section, and Leonard P. Avery, Assistant United States Attorney, *Attorneys for Plaintiff.*

Margaret R. Tribble and William E. O'Neil (Lemle, Kelleher, Kohlmeyer & Matthews), *Attorneys for Defendant.*

Edward J. Boyle, Sr., D.J.:

This *in rem* action was brought pursuant to 33 U.S. Code, sec. 1320(f) by the United States of America to

enforce the collection of clean-up costs and a penalty assessed by the United States Coast Guard for an oil spill from a vessel owned by defendant. The facts surrounding this incident are not in dispute and all relevant facts have been stipulated by the parties.

The defendant, LeBeouf Brothers Towing Company (LeBeouf) is a Louisiana corporation engaged in the business of waterborne transportation of petroleum and petroleum products. At the time of the oil spill in question it was the owner of the *LBT 4*, a non self-propelled tanker barge of 420 gross tons.

Prior to March 20, 1974, LeBeouf entered into an oral contract with Bayou Marine Corporation (Bayou), a marine broker engaged in the business of securing towage contracts for its clients, under which Bayou agreed to procure the services of a tug and competent crew, including a licensed tankerman,[1] to tow the *LBT 4* from place to place, on an itinerary as directed by LeBeouf, for an indefinite term. For this purpose, Bayou secured the services of the M/V *Harding R*, a tug of 29 gross tons, owned and/or operated by Barracuda Marine Corporation. The *LBT 4*, during the period covered by the towage agreement, was to carry cargoes owned by clients of LeBeouf. The navigation of the vessels and the unloading and loading of cargoes would be performed by the crew of the tug. LeBeouf

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1 Federal regulations require that the person in charge of the transfer of oil to or from a vessel such as the *LBT 4* must at least be a licensed tankerman. 33 CFR, sec. 155.710(a)(2).

maintained no control whatsoever over the navigation of the tug and barge, other than identifying locations where cargo was to be taken on and discharged, nor over the tug's crew. LeBeouf paid for Bayou's services monthly.

On March 20, 1974, operating pursuant to the towage contract, the tug *Harding R* and the *LBT 4* moored at the Permian Oil facility, Westwego, Louisiana, for the purpose of discharging a cargo of crude oil at that facility. While there, an employee of Barracuda who was a crewman on the tug, acting as a tankerman but who was not a licensed tankerman, accidentally discharged 60 barrels of crude oil into the Mississippi River when he opened the wrong valve in attempting to discharge the barge's cargo. Shortly thereafter, the Coast Guard conducted an investigation of the oil spill. Neither LeBeouf, Bayou, nor Barracuda cleaned up or caused to be cleaned up the discharged oil. For this purpose the Coast Guard employed the services of Oil Mop, Inc. For its services in cleaning up the oil discharged from the *LBT 4*, Oil Mop, Inc. was paid a total of $38,357.49. Additionally, the Coast Guard accumulated other personnel and material costs in the amount of $331.51, thereby incurring total clean-up costs in the amount of $38,689. The Coast Guard, pursuant to 33 U.S. Code, sec. 1321(f)(1), demanded of LeBeouf payment in this amount, but such payment was not made, and has not since been made by LeBeouf, nor by anyone in its behalf.

By letter of July 17, 1975 the Coast Guard also notified LeBeouf of its intention to assess, by authority of 33 U.S. Code, sec. 1321(b)(6), a civil penalty of $5,000 for the discharge of a harmful quantity of oil into the navigable waters of the United States, and informed LeBeouf of its right to oppose the penalty. LeBeouf, by letter of September 26, 1975, alleged immunity from the penalty and asserted that the proposed penalty was too high. The penalty was eventually assessed, appealed, and affirmed by the Commandant of the United States Coast Guard.[2] The penalty remains unpaid and this suit was brought both to enforce the penalty and to collect the clean-up costs.

I. The Clean-up Costs.

The Federal Water Pollution Control Act (FWPCA), 33 U.S. Code, secs. 1251-1376, provides, *inter alia*, that the owner or operator of a vessel from which oil is illegally discharged is liable for actual clean-up costs, unless such owner or operator can prove that a discharge was

> "caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was

2 The entire Coast Guard Administrative Civil Penalty File is attached to Record Doc. #19.

not negligent. * * *" 33 U.S. Code, sec. 1321(f)(1).

It is LeBeouf's contention that the acts of the crew member of the *Harding R* that caused the oil spill in question were the acts of a "third party," and therefore that it is not liable for the costs of cleaning up the spill. The United States contends that the tug merely acted for the barge and therefore that the defendant is responsible for the acts which caused the discharge. Thus, the ultimate issue is whether the tug and its crew were third parties, within the meaning of Section 1321(f)(1), in relationship to LeBeouf.[3]

There is little jurisprudence on the issue of what constitutes a "third party" for purposes of section 1321(f)(1) and, as has been noted, there is also little specifically relevant legislative history. *Burgess v. M/V Tamano*, 1977 AMC 1892, 1920, 564 F.2d 964, 982 (1 Cir., 1977). In *Burgess* the court held that a compulsory

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3 33 U.S. Code, sec. 1321(g), as of the date this action was brought, provided that the United States could pursue a third party for clean-up costs only after the owner/operator of a vessel had proven that a discharge was caused solely through the acts or omissions of a third party. This section was amended by the Clean Water Act, effective in December of 1977, to provide that those dischargers asserting a third party defense must pay the clean-up costs to the United States and be subrogated to the rights of the government against the third parties. See 33 U.S. Code, sec. 1321(g) (West 1970-77 Supp.). The law, as it existed prior to December, 1977, under which this case must be decided, requires the government to proceed first against the owner/operator, and if unsuccessful because of a third party defense, to then proceed against the third party.

pilot is not a third party, largely because "he is at all times subject to the control of the ship."[4] *Id. Tug Ocean Prince, Inc. v. United States*, 1978 AMC 1806, 436 F.Supp. 907 (S.D. N.Y., 1977) involved a fact situation similar to the instant one. There a tug caused an oil spill by negligently pushing its tow, an oil barge owned by another company, onto some submerged rocks. The court did not discuss the issue of whether the tug was a third party in relation to its tow, but rather it simply treated the tug as a third party without questioning its status as such under the circumstances of the case.

Similarly, we have determined that the tug, whose crew member caused the spillage, is a third party within the meaning of 33 U.S. Code, sec. 1321(b)(6). Unlike the situation in *Burgess, supra*, where a compulsory pilot was held not to be a third party because he was at all times under the offending ship's control, the defendant in this case never controlled the routine operations of the *Harding R* and its crew, other than to dictate the flotilla's itinerary. LeBeouf was charged a rate which included the cost of Barracuda providing a licensed tankerman.[5] Yet none was provided and it was an unlicensed and uncertificated crew member of the tug, performing the task of a tankerman at the direction of

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4 The court in *Burgess* did give, as an example of a third party, a vandal who opens a ship's valve. 1977 AMC at 1920, 564 F.2d at 965.

5 Deposition of Harmon Joseph Dupre, taken on April 25, 1978, at p. 24 (Record Doc. #11).

one of the tug's owners, whose acts caused the spill.[6] To hold they were not the acts of a third party would be to render the clear language of 33 U.S. Code, sec. 1321(b)(6) meaningless.

The relationship between the *LBT 4* and the *Harding R* is determined and governed by maritime principles, see *Burgess, supra,* 1977 AMC 1892, 564 F.2d at p. 983, as is the contract of towage involving those vessels. Under those principles it is the tug's duty to perform all aspects of its contract competently.

> "Generally speaking in every contract of towage (unless the parties agree to the contrary and such agreement is not invalid as being against public policy), the towing company undertakes that it possesses sufficient knowledge and skill to perform the contract safely; that it will use its best endeavors, skill and diligence for that purpose; that it will provide a seaworthy vessel, properly equipped and manned, and of sufficient capacity and power to perform the task undertaken, under conditions which are to be reasonably anticipated." A. Parks, *Law of Tug, Tow and Pilotage,* 57 (1971).

See also *Griffin on Collision,* Section 178 at p. 415. And it is well settled that when a tug causes its tow to inflict damage to a third party, the tow cannot be held respon-

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6 Deposition of Billie Truman Dye, taken May 24, 1978, at pp. 1-6 (Record Doc. #16).

sible for the tug's fault merely because the two are attached. See, *e.g., Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal*, 251 U.S. 48 (1919); *Eugene Moran*, 212 U.S. 406 (1908).

In this case, LeBeouf turned its unmanned and non self-propelled barge over to the tug for day-to-day towing and operation. It was the tug's responsibility to carry a competent crew, including a licensed tankerman,[7] while engaged in towing the *LBT 4*. That the tug was not so manned and that the tug's crew member acted negligently cannot be ascribed to LeBeouf merely because it owned the barge. In our view the purpose of the third party defense is to relieve the owner of a vessel of liability for acts done by parties who are not controlled by the offending vessel. Accordingly, we find the defendant is not liable for the clean-up costs.

II. The Civil Penalty.

The Coast Guard assessed a penalty of $5,000 against defendant. This is the maximum penalty allow-

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7 It appears that one Larry LeBeouf was a one-half owner of the tug (Deposition of Billie Truman Dye, p. 5, Record Doc. #16) and that on occasions he worked aboard the tug as a licensed tankerman (*id.* pp. 6, 7), but when not aboard he would come to the tow's location, when called, to act as tankerman (*id.* pp. 4, 6 & 7). On the occasion under consideration, he gave Dye instructions to start unloading and he would be present later. Before he arrived, the spillage occurred (*id.* p. 5). Larry LeBeouf was not identified with the defendant. Deposition of Harmon Joseph Dupre taken April 18, 1978 at p. 7, Record Doc. #5.

able under 33 U.S. Code, sec. 1321(b)(6), which provides, in pertinent part, that:

> "Any owner or operator of any vessel * * * from which oil or a hazardous substance is discharged in violation [section 1321(b)(3)] shall be assessed a civil penalty by the secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. * * * In determining the amount of the penalty * * * the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary."

This subsection, unlike section (f)(1), does not allow the defense of third party responsibility.

Defendant, objecting to the assessment of this penalty on two grounds, first contends that applying a section (b)(6) penalty to the owner of a vessel where the discharge was solely the act of a third party constitutes conduct that shocks the conscience so as to be violative of due process. Alternatively, the defendant argues that the amount of the fine is unreasonably high.

To support its argument that assessment of the maximum penalty is excessive, defendant has cited us to *United States v. General Motors Corporation*, 1976 AMC

1348, 403 F.Supp. 1151 (D. Conn., 1975), wherein the court reduced a $5,000 penalty to $1 against a virtually blameless defendant. We also note that in *Tug Ocean Prince, Inc. v. United States, supra,* the court remanded to the Coast Guard for reconsideration under 33 U.S. Code, sec. 1320(f) a $5,000 fine which it found should be mitigated by a showing of no culpability. The Coast Guard's own policy, as stated in Commandant Instruction 5922-11A[8] would take into account the degree of culpability of the offending party when assessing the gravity of the violation and the penalty therefor.

We have determined that the instant oil discharge was caused by a third party for purposes of the assessment of clean-up costs. Although section 1321(b)(6) does not provide for a third party defense in assessing the civil penalty, the Coast Guard's own policy and the few courts that have considered the question have considered the degree of culpability in determining the amount of a penalty. See *United States v. General Motors Corporation, supra; Tug Ocean Prince, Inc. v. United States, supra.* The Coast Guard's file in this matter does not reflect just what factors were used in fixing the penalty at the maximum, but it is obvious that this assessment was influenced by the finding that LeBeouf was entirely responsible for the discharge and resulting clean-up

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8 This Instruction is found as an appendix to the court's decision in *United States v. LeBeouf Brothers Towing Co.*, another case against the instant defendant, reported at 1974 AMC 842, 377 F.Supp. 558 (E.D. La., 1974), *rev'd,* 1976 AMC 1416, 537 F.2d 149 (5 Cir., 1976), *cert. denied,* 430 U.S. 987, 1977 AMC 1623 (1977).

costs. In light of our finding that a third party was responsible for such discharge, and because we find that culpability should be a factor in assessing the penalty, we remand the penalty issue to the Coast Guard for reconsideration consistent with this opinion. This action makes it unnecessary to consider defendant's due process argument at this time.

Accordingly, it is ordered that judgment shall be entered herein in favor of defendant dismissing the United States' claim for $38,357.49, representing the costs of removing oil discharged from the *LBT 4* onto the Mississippi River, and remanding to the Coast Guard the civil penalty, if any, to be assessed against defendant for reconsideration consistent with this opinion.